

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OTTEBROOK, MICHIGAN, 1900.

No. 205.

GEORGE M. ISRAEL, PLAINTIFF IN ERROR.

VS.

CHARLES F. GALE, AS RECEIVER OF THE RUSSIAN
NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

FILED FOR RECORD BY CLERK.

1900

46
205

(16,828.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 265.

GEORGE M. ISRAEL, PLAINTIFF IN ERROR,

*vs.*CHARLES F. GALE, AS RECEIVER OF THE ELMIRA
NATIONAL BANK.IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES DAVIS, as Receiver of the Elmira National Bank, De-
fendant in Error. }

Transcript of Record.

Error to the circuit court of the United States for the southern
district of New York.

Printed under the direction of the clerk.

[Stamped :] United States circuit court of appeals, second circuit.
Filed Mar. 12, 1896. James C. Reed, clerk.

1 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the judges of the
circuit court of the United States for the southern district of New
York, Greeting :

Because in the record and proceedings, as also in the rendition
of the judgment of a plea which is in the said circuit court, be-
fore you, or some of you, between Charles Davis, as receiver of the
Elmira national bank plaintiff, and George M. Israel, defendant, a
manifest error hath happened, to the great damage of the said defend-
ant, George M. Israel, as is said and appears by his complaint, we, be-
ing willing that such error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties aforesaid in this behalf,
do command you, if judgment be therein given, that then, under
your seal, distinctly and openly, you send the record and pro-
ceedings aforesaid, with all things concerning the same, to the judges
of the United States circuit court of appeals for the second circuit,
at the city of New York, together with this writ, so that you have
the same at the said place, before the judges aforesaid, on the 10th
day of March, 1896, that the record and proceedings aforesaid being
inspected, the said judges of the United States circuit court of ap-
peals for the second circuit may cause further to be done therein to
correct that error, what of right and according to the law and custom
of the United States ought to be done.

[L. s.] Witness the Honorable Melville W. Fuller, Chief Justice
of the Supreme Court of the United States, this 10th day of
February, in the year of our Lord one thousand eight hun-
dred and ninety-six, and of the Independence of the United
States the one hundred and twentieth.

JOHN A. SHIELDS,

*Clerk of the Circuit Court of the United States of America
for the Southern District of New York,
in the Second Circuit.*

The foregoing writ is hereby allowed.

E. H. LACOMBE,

U. S. Circuit Judge.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

JOHN A. SHIELDS, *Clerk.*

3 United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }
against
 GEORGE M. ISRAEL. }

To the above-named defendant :

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 8th day of August, in the year one thousand eight hundred and ninety-five.

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

Bissell, Sicard, Bissell & Carey, plaintiff's attorneys.

Office and post-office address, 284 Main St., Buffalo, New York.

4 Circuit Court of the United States for the Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }
 Plaintiff,
against
 GEORGE M. ISRAEL, Defendant. }

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges as follows :

1. That at the times hereinafter mentioned the Elmira national

bank was a national banking association, organized and incorporated on or about the 1st day of August, 1887, under and by virtue of the provisions of the statutes of the United States in such case made and provided, passed June 3d, 1864, and the acts amendatory thereof, under the name and title of the Elmira national bank.

2. That the said bank carried on the business of banking at the city of Elmira, in said northern district of New York, from August, 1887, down to and until the 23d day of May, 1893, when the said bank suspended and discontinued its business, and has not since resumed the same.

3. That on the 26th day of May, 1893, James H. Eckels, then being Comptroller of the Currency of the United States, and being thereunto duly authorized by law, did declare the said bank insolvent, and did thereupon appoint this plaintiff, Charles Davis, as receiver of the said Elmira national bank and all the property and assets thereof, by a certificate in writing, under his hand
5 and official seal, dated on said 26th day of May, 1893.

4. That this plaintiff thereupon duly qualified as such receiver, as required by law, and on the 2d day of June, 1893, entered upon his trust as such receiver, and took possession of the books, records and assets of every description of the said bank, and has ever since been, and still is, acting and engaged in the discharge of his duties as such receiver, among which duties is the collection of all debts due the said Elmira national bank.

5. And the said plaintiff further alleges that on the 4th day of May, 1893, at the city of New York, county of New York, N. Y., the said defendant, George M. Israel, made his certain promissory note in writing, in the words and figures following, to wit:

"\$17,000.00.

NEW YORK, *May 4th*, 1893.

On demand after date I promise to pay to the order of Elmira national bank seventeen thousand dollars, payable at the Elmira national bank. Value received.

No. 10996. Due —.

GEO. M. ISRAEL."

And then and there delivered the same to the said Elmira national bank for value, which thereupon became the owner and holder thereof, and continued to hold and own the same until the 26th day of May, 1893, when, as hereinbefore set forth, this plaintiff, as receiver as aforesaid, became the owner of the same by virtue of the transfer of all the assets of the said bank to him, said receiver.

6. That the said promissory note has been duly presented for payment on behalf of the holder thereof, at the place where
6 the same was made payable, to wit: at the Elmira national bank, in Elmira aforesaid, and payment thereof demanded and refused.

7. That the plaintiff, as such receiver, is still the owner and holder of said promissory note, and that the same has not been paid nor any part thereof. That there is now due and payable thereon

to this plaintiff from the said defendant the sum of \$17,000, with interest thereon from the 4th day of May, 1893.

Wherefore the plaintiff demands judgment against the said defendant for the sum of seventeen thousand dollars (\$17,000), with interest thereon from the 4th day of May, 1893, besides the costs of this action.

BISSELL, SICARD, BISSELL & CAREY,
Attorneys for Plaintiff, 284 Main Street, Buffalo, N. Y.

NORTHERN DISTRICT OF NEW YORK, } ss:
County of Chemung,

Charles Davis, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHAS. DAVIS.

Sworn to before me this 5th day of June, 1895.

[SEAL.]

M. H. EATON,
Notary Public.

(Endorsed:) U. S. circuit court, southern district of New York.

7 Charles Davis, receiver, &c., vs. George M. Israel. Complaint. Bissell, Sicard, Bissell & Carey, attorneys for plaintiff, office and P. O. address, 284 Main street, Buffalo, N. Y., I hereby certify that on the 13th day of August, 1895, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named George M. Israel, by exhibiting to him the within originals, and at the same time leaving with him a copy of each thereof. John H. McCarty, United States marshal, southern district of New York. Dated Sep. 17, 1895.

U. S. Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }
Plaintiff, }
against }
GEORGE M. ISRAEL, Defendant.

The above-named defendant, by his solicitor, Frank Sullivan Smith, for answer to the plaintiff's complaint herein:

I. Admits, upon information and belief, the allegations contained in the first subdivision of said complaint.

8 II. Defendant admits that said bank carried on the business of banking at the city of Elmira, in the northern district of New York, but defendant alleges that he has no knowledge or information sufficient to form a belief as to whether, on the 23d day of May, 1893, the said bank suspended and discontinued its business, and has not since resumed the same.

III. Answering the allegations contained in the third and fourth subdivision of said complaint, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of such allegations, and therefore denies the same.

IV. Answering the allegations contained in the fifth subdivision of said complaint, defendant admits that on or about the fourth day of May, 1893, at the city of New York, he made his certain promissory note in writing in the words and figures substantially as set forth in said complaint. Defendant denies that he then and there delivered the same to said Elmira national bank for value, which thereupon became the owner and holder thereof. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph contained.

Defendant alleges that immediately upon making his certain promissory note, as aforesaid, he delivered the same to one David C. Robinson; and defendant alleges that said note was entirely without consideration, and void, and no value therefor was received by this defendant either from said David C. Robinson, said Elmira national bank or from any other source. And this defendant further alleges that said David C. Robinson was in no way authorized to act as the agent of this defendant with regard to said note, and if the same was delivered to said Elmira national bank by said David C. Robinson, said Robinson so delivered said note to said bank for his own use, benefit and account, and not as the agent of this defendant, and in no manner for the use, benefit or account of this defendant; all of which facts were well known to said Elmira national bank and its officers, as this defendant is informed and believes.

9 V. Answering the allegations contained in the sixth and seventh subdivisions of said complaint, this defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

FRANK SULLIVAN SMITH,
Solicitor for Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, City and County of New York, } ss:

George M. Israel, being duly sworn, deposes and says: That he is the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEORGE M. ISRAEL.

Sworn to and subscribed before me this 20th day of September, 1895.

FREDERIC H. RIDGWAY,
Notary Public (100), City and County of New York.

(Endorsed :) U. S. circuit court, southern district of New York. Charles Davis, as receiver, &c, plaintiff, against George M. Israel, defendant. Answer. Frank Sullivan Smith, solicitor for defendant, No. 54 Wall street, New York, N. Y. Received 24 day of Sept., 1895.

10 U. S. Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira Na-	} Amended Answer.
tional Bank, Plaintiff,	
<i>against</i>	
GEORGE M. ISRAEL, Defendant.	

The above-named defendant by his attorney, Frank Sullivan Smith, for an amended answer to the plaintiff's complaint herein :

I. Admits, upon information and belief, the allegations contained in the first subdivision of said complaint.

II. Defendant admits that said bank carried on the business of banking at the city of Elmira, in the northern district of New York, but defendant alleges that he has no knowledge or information sufficient to form a belief as to whether on the 23d day of May, 1893, the said bank suspended and discontinued its business, and has not since resumed the same.

III. Answering the allegations contained in the third and fourth subdivisions of said complaint, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of such allegations, and therefore denies the same.

IV. Answering the allegations contained in the fifth subdivision of said complaint, defendant admits that on or about the 4th day of May, 1893, at the city of New York, county and State of New York, he made his certain promissory note in writing, in the words and figures substantially as set forth in said complaint. Defendant denies that he then and there delivered the same to said Elmira national bank for value, which thereupon became the owner and holder thereof. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph contained.

Defendant alleges that immediately upon making his certain promissory note, as aforesaid, he delivered the same to one David C. Robinson; and defendant alleges that said note was entirely without consideration, and void, and no value therefor was received by this defendant, either from said David C. Robinson, said Elmira national bank or from any other source. And this defendant further alleges that said David C. Robinson was in no way authorized to act as the agent of this defendant with regard to said note, and if the same was delivered to said Elmira national bank by said David C. Robinson, said Robinson so delivered said note to said bank for his own use, benefit and account, and not as the agent for this defendant, and in no way for the use, benefit or account of this defendant; all of which facts were well known to said Elmira national bank and its officers, as this defendant is informed and believes.

V. Answering the allegations contained in the sixth and seventh subdivisions of said complaint, this defendant denies that there is now due and payable on said note to the plaintiff from this defendant the sum of \$17,000, with interest thereon from the 4th day of May, 1893. Defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth of the remaining allegation in said sixth and seventh subdivisions of said complaint.

12 VI. For a second, separate and distinct defense to the cause of action alleged in the plaintiff's complaint herein, defendant alleges, upon information and belief, that on the said 4th day of May, 1893, at the time he made his certain promissory note in writing, in the words and figures substantially as set forth in said plaintiff's complaint, the said David C. Robinson, to whom defendant delivered said note as aforesaid, was a depositor in said Elmira national bank and a director thereof and controlled and directed the affairs of said bank, and had overdrawn his account at said bank in an amount exceeding the amount for which said note was drawn, to wit, \$17,000, and that said Robinson delivered said note to said Elmira national bank to make good in part the amount of said overdraft; that said bank parted with no value upon the receipt of said note from said Robinson, but merely gave him credit on account for the amount thereof. Defendant further alleges, upon information and belief, that at the time of the making of said note as aforesaid the said Elmira national bank had loaned to said David C. Robinson upon his paper up to the legal limit of its right to loan to any one individual and that the note in suit was obtained from defendant and was used by said Robinson for the purpose of evading the law in procuring from said bank a greater amount of money than it was authorized to loan to one individual. That said bank and its officers, well knowing that said note was without consideration so far as this defendant is concerned, and that the same was a mere subterfuge for the obtaining of money from said bank, contrary to the limit prescribed by law, and acting in collusion with said Robinson for the accomplishment of such purpose, took said note from said Robinson and credited the proceeds thereof to said Robinson to make good to that extent said Robinson's account, which
13 was at that time overdrawn as aforesaid. That the taking of said note by said Elmira national bank, under the circumstances above stated, was *ultra vires* and unlawful, and said bank or the plaintiff herein as its receiver, never became the lawful owner and holder thereof.

Defendant further alleges that at the time he made his certain promissory note as aforesaid he was not worth the said sum of \$17,000, or any other substantial sum, and had no financial standing whatever; which facts were well known to said David C. Robinson and to said Elmira national bank, and its officers as defendant is informed and believes. And defendant alleges that he had no knowledge, at the time he delivered said note to said Robinson as aforesaid, how said note was to be used by said Robinson; and defendant believed that said Robinson would make said note good

and of value, either by securing a good endorsement to the same, or by depositing good collateral therewith in case said note was used at all by said Robinson. And defendant alleges upon information and belief, that said Elmira national bank, and its officers, well knowing defendant's inability to pay said note, or any part thereof, as aforesaid, took the said note from said Robinson, relying solely upon said Robinson's promise to pay the same; that said bank and its officers, placed no reliance upon defendant in the premises, and advanced said money to make good said Robinson's account, to the amount of said note, not upon the faith of defendant's name and responsibility, but relying wholly upon and looking solely to said Robinson for the payment thereof.

Wherefore, defendant demands judgment that the plaintiff's complaint be dismissed with costs.

FRANK SULLIVAN SMITH,
Attorney for Defendant.

14 STATE OF NEW YORK, { ss:
City and County of New York, {

George M. Israel, being duly sworn, deposes and says, that he is the defendant in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. M. ISRAEL.

Sworn to and subscribed before me, this 11th day of October,
1895.

FREDERIC H. RIDGWAY,
Notary Public (100), City & County of New York.

Endorsed: U. S. circuit court, southern district of N. Y. Charles Davis, as receiver of the Elmira nat. bank, plaintiff, against George M. Israel, defendant. Amended answer. Frank Sullivan Smith, att'y for defendant, No. 54 Wall street, New York, N. Y.

15 At a stated term of the circuit court of the United States
of America, for the southern district of New York, in the
second circuit, held at the United States court-rooms, in the city of
New York, on Tuesday, the fourteenth day of January, in the year
of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Nathaniel Shipman, circuit judge.

CHARLES DAVIS, as Receiver, &c.,
vs.
GEORGE M. ISRAEL.

Now comes the plaintiff by Martin Carey, his attorney, and moves the trial of this cause.

Likewise comes the defendant by Frank Smith, his attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties the jury, by direction of the court, say that they find a verdict for the plaintiff for the sum of seventeen thousand dollars, with interest from the date of the commencement of the suit.

It is stipulated that the interest be computed by counsel.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

16 United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }
against
 GEORGE M. ISRAEL. }

The issues in this action having been brought on for trial before the Honorable Nathaniel Shipman, one of the judges of said court and a jury, at a term thereof held on the 14th day of January, 1896, at the Federal building in the city of New York and county of New York, and the defendant appearing by his counsel, and the issues having been duly tried, and the court having directed a verdict for the plaintiff, and the jury having duly rendered a verdict for the plaintiff on the 15th day of January, 1896, for the sum of seventeen thousand dollars and the interest thereon from the 13th day of August, 1895, the date of the commencement of this action, which interest amounts to the sum of \$425.66, making the verdict amount in all to the sum of seventeen thousand four hundred twenty-five dollars and sixty-six cents and the interest on said verdict from the day it was rendered to this date having been duly computed by the clerk of this court at the rate of six per cent. per annum, which interest amounts to the sum of fifty-three dollars and eighty-two cents, which, together with the sum awarded by said verdict amounts in all to the sum of seventeen thousand four hundred seventy-nine dollars and fifty-eight cents, and the costs of said plaintiff having been duly adjusted at the sum of fifty-six $\frac{15}{100}$ dollars:

17 Now, on motion of Bissell, Sicard, Bissell & Carey, attorneys for said plaintiff,

It is adjudged that said plaintiff do recover of said defendant the sum of seventeen thousand four hundred seventy-nine dollars and forty-eight cents (\$17,479.48), together with the sum of fifty-six $\frac{15}{100}$ dollars costs and disbursements, amounting, in all, to the sum of seventeen thousand five hundred thirty-five $\frac{63}{100}$ dollars (\$17,535.63).

Judgment signed and entered this 4th day of February, 1896.

JOHN A. SHIELDS, *Clerk.*

(Endorsed :) United States circuit court, southern district of New York. Charles Davis, as receiver, &c., vs. George M. Israel. Judgment. Bissell, Sicard, Bissell & Carey, attorneys for pl'ff. Office and P. O. address, 284 Main street, Buffalo, N. Y. U. S. circuit court, Filed Feb. 4, 1896, 3.20 p. m. John A Shields, clerk.

United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank,
 Plaintiff,
against
 GEORGE M. ISRAEL, Defendant.

Be it remembered that afterward, to wit, on the 14th day
 18 of January, A. D. 1896, at a stated term of the said court
 begun and holden in the city of New York, in and for the
 said southern district of New York, before his Honor Nathaniel
 Shipman, circuit judge, the issue joined in the above-stated cause
 between the said parties (*pro ut* the pleadings), came on to be tried
 before the said judge and a jury, the plaintiff being represented by
 Messrs. Bissell, Sicard, Bissell & Carey, and the defendant by Frank
 Sullivan Smith, Esq., and upon the trial of said issue in order to
 maintain and prove the same, the attorneys for the plaintiff duly
 put in evidence the promissory note of the defendant set forth in
 the complaint in said cause in the words and figures following, to
 wit:

"\$17,000.00.

NEW YORK, *May 4th*, 1893.

On demand after date I promise to pay to the order of Elmira
 national bank, seventeen thousand dollars, payable at the Elmira
 national bank. Value received.

No. 10996. Due —.

GEO. M. ISRAEL."

Counsel for the defendant admitted that Charles Davis is the re-
 ceiver of the Elmira national bank.

And thereupon the plaintiff rested.

Whereupon, the defendant's attorney, to maintain and prove the
 issue on the part of said defendant called GEORGE M. ISRAEL, the
 defendant, as a witness in his own behalf, who being first duly sworn,
 testified among other things as follows:

"I reside in Brooklyn. I am forty-two years of age. I am at
 present engaged in the insurance business. In the months of April
 and May, 1893, I was employed in the banking-house of I. B.
 19 Newcombe & Co., in Wall street, New York, as stenographer
 and typewriter. I was not then and I am not now a man of
 property. I know D. C. Robinson. At the time I made this note
 I did not receive any valuable thing or other consideration for the
 making of it; I have never received any consideration for the mak-
 ing of the note.

I had a conversation with D. C. Robinson at the time of the mak-
 ing of the note. He stated to me the object or purpose for which
 he desired the note. He stated to me that he desired some accom-
 modation notes and he wanted us clerks to make them, and stated
 the amount. He said that the reason he wanted the accommoda-
 tion notes was that he had exceeded his line of discount and could
 not get any more accommodation; that he was building a power-

house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes, it would enable him to accomplish that; he also added that we would not be put in any position of paying them at any time; that he would take care of them and gave us positive assurance on that point, and naturally, knowing the man and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes. He said it would simply be a temporary matter. At the time I gave the note in suit other notes were given by Mollenhauer and Roll, who were with me, clerks in the office of I. B. Newcombe & Co. At that time neither of the members of the firm of I. B. Newcombe & Co. was at his place of business. Mr. Newcombe was in Bermuda, and Mr. Weidenfeld was sick with typhoid fever at Orange, N. J.

No demand has ever been made upon me for the payment of this note prior to the bringing of this suit.

I never authorized the insertion in the body of the note after the word at, of the words 'Elmira national bank.' That space
20 must have been left blank at the time, from the fact that it was filled in afterwards; my recollection is that it was left blank."

Being cross-examined by counsel for the plaintiff, the witness further testified: "I remember seeing the receiver (plaintiff) in the Times building, New York, before I was sued, and talking with him. He talked to me about this particular paper, but he made no demand for payment. He said that he did not want to sue me. I could not pay it. I never expected to. I did not pay it, but he did not make any demand for me to pay it. I was not to get any money out of this paper when I gave it; there was not any consideration mentioned. When I gave it I was not to get any money. It was given merely as a temporary accommodation paper; nobody was more surprised, when I learned it was not paid, than I was."

Whereupon the attorney for the defendant, further to maintain and prove the said issue on the part of said defendant, read the testimony of the following witnesses, taken *de bene esse*, to wit:

JACKSON RICHARDSON, who being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I have been a manufacturer of boots and shoes in Elmira for thirty-four years. I was for less than two years, in '92 and '93, president of the Elmira national bank. I was president of the Elmira national bank on the 4th day of May, 1893.

Q. How many in the board of directors?

A. It has gone from my mind, I can't tell you; I should say nine directors.

Q. How many meetings of the board of directors did you attend during that time?

A. I attended every meeting that I was in the city, monthly
21 meetings; I was out of the city for some time and Mr. Kellogg took my place.

Q. During what time were you out of the city?

A. I couldn't say.

Q. You attended most of the meetings of directors held that year and a half?

A. Yes, sir; most of them.

Q. And the meetings were held monthly?

A. Monthly.

Q. Who does generally attend those meetings?

A. The directors.

Q. Who were they?

A. Well, I can remember one, Col. Robinson, Mr. Bush, Mr. Kellogg, Mr. Wyckoff.

Q. What Mr. Bush do you refer to?

A. J. J. Bush.

Q. Was he also cashier of the bank?

A. Yes, sir.

Q. What Col. Robinson do you refer to?

A. Col. D. C. Robinson.

Q. Who were the active members of the directory, the men who had the most to say about the business of the bank?

A. Col. D. C. Robinson was the man. Mr. Bush, of course, he was cashier; he was director also.

Q. What was the usual course of business in your meetings of the board?

A. Looked over the finances of the bank, and what the bank was doing, and how they were doing it, safely or correctly, and all those details.

Q. When you say that Col. Robinson and Mr. Bush were the most active of the directors, how did they display their activity?

A. By showing the standing of the bank—that is, especially Mr. Bush—and giving us a statement of how the bank was working.

Q. Was there any part of the business which was deputed to Col. Robinson, or of which he took principal charge?

A. No; I think not.

22 Q. Do you remember whether he was on any committees with the directors?

A. My impression is he was not.

Q. Then why do you say he was one of the most active of the directors?

A. Well, he and Mr. Bush consulted together as much, perhaps more, than others.

Q. How do you know they consulted together?

A. Well, sir, I don't know it, only what I hear talked by other parties in the bank.

Q. Did you see them in consultation?

A. No, sir; I might say right here, most of the time I was out of the city; I was not here looking very much of the time myself.

Q. What members of your board, if some more than others, controlled the policy of the bank?

A. I think Mr. Robinson controlled; that is my judgment. Col. Robinson had a municipal company account at the bank. I think Col. Robinson had a private account. The details I did not look

after very much myself; I wasn't there to do it; I didn't have my health to do it. I looked that over just as I did my own business; took a general survey. I did not scrutinize closely the account of Col. Robinson, or of the municipal company. By the municipal company I mean the Elmira Municipal Improvement Company, of which Col. Robinson was president. I knew by the report of the committee on finance the precise condition of the account of Col. Robinson personally and of the company of which he was president at my bank. I didn't look it over in detail myself, but they reported everything favorable.

I think my son Frederick was one of the committee of finance; I don't recall the others. I remember one overdraft; it was reported to myself as president of the bank by the comptroller at Washington several months before the bank failed. It was reported to me as Col. Robinson's individual overdraft. I had no knowledge of

23 that overdraft until I obtained the knowledge from the Comptroller of the Currency. I knew from Mr. Bush that Col.

Robinson was discounting paper at the bank. Col. Robinson did not ask me to discount paper for him. I suppose he asked Mr. Bush. Such discounts as Col. Robinson obtained either for himself personally, or for the company of which he was president were obtained through Mr. Bush, the cashier. I called Mr. Bush's attention to this overdraft and then I asked Mr. Bush how Mr. Robinson's account was running; he said he had collaterals here in security for everything he was doing at the bank. I will say it was some time within six months of the failure of the bank was the time when I first obtained knowledge of this overdraft. I first mentioned the matter to Mr. Bush and he talked it up with Mr. Robinson, and the thing was entirely arranged satisfactory with the understanding that it would not occur again the second time. I said to Mr. Bush if that occurred again I would resign my office, and he assured me that it would not. It was arranged by Mr. Robinson, Mr. Bush and myself that that would be the last time there would be an overdraft; he paid it up promptly. I know it was paid up; but I don't know what way, I don't know it was paid actually by the use of money, only what Mr. Bush told me; he said it was arranged and paid. For anything that I know of my own knowledge, this overdraft, of which I obtained information through the Comptroller of the Currency, may have been made good by the use of notes furnished to the bank by Colonel Robinson instead of the payment of money. That may have been that way, I couldn't state.

Q. Are you able to state whether or not that particular overdraft was made good by the note of the defendant George M. Israel for \$17,000, together with other notes?

A. The overdraft was only four or five thousand dollars.

24 That is the only overdraft of which I ever had any knowledge. I don't know the particular manner in which that overdraft was made good. I have no knowledge whether or not this note of George M. Israel, dated May 4th, 1894, for \$17,000, or the note of John A. Bowers, or Frederick H. Mollenhauer or

Henry S. Roll, or one of them was used for that overdraft, only what Mr. Bush told me, that the overdraft was paid. He told me that it was paid. He didn't tell me by whom, or in what manner it had been paid. I didn't look at the books to ascertain; I didn't have the details. I didn't say anything to Colonel Robinson about resigning if that overdraft occurred again. Mr. Bush talked with the Colonel about that; not in my presence. I know that he talked with the Colonel, because the Colonel came up and showed me a statement of what he was worth afterwards, and said Mr. Bush talked with him. That statement, showing that he was worth a million and a quarter of dollars, restored my confidence in the Colonel; I had considerable confidence in Colonel Robinson and believed that he was worth a million and a quarter of dollars; that was on paper. I thought it was serious to have an overdraft on the bank, and I didn't like that myself. I told Mr. Bush I would not act as president of the bank if it occurred again. I had entire confidence in Mr. Robinson; I supposed he was a rich man.

The capital of the bank was \$200,000. Sixty or seventy thousand dollars' worth of stock stood in Col. Robinson's name. I can't name the precise amount. The bank did not permit Col. Robinson to have over \$20,000 discount. I didn't examine to see whether he was exceeding that line, I didn't have the details. The committee reported that he was not exceeding his line of discount; he was not allowed to. He had no right to. I was not there all the time. I know he had no right to. I did not know whether he was exceeding his line of discount or not. The line of discount

25 which was permitted to the Elmira Municipal Improvement Company was under \$20,000; nothing over. I had no knowledge whether or not that company exceeded its limit. To my knowledge Col. Robinson did not have a line of discount largely in excess of \$20,000; not to my knowledge. I don't know what he did when I was out of the city; he didn't exceed his line of discount when I was in the city; that is, of my knowledge. Probably he may have done that without my knowledge. It might have been possible for the matter to have been fixed up between him and Mr. Bush and I not know of it. I was down there every day I was in the city and looked over the books, that is, the balance-sheet. I understood that Mr. Bush was cashier and he ought to follow the directions of the directors. I knew he and Mr. Robinson were having things worked together some way or other. I suppose he followed the directions of the directors, not of Col. Robinson.

Q. Do you not, from the subsequent knowledge which you have obtained, now know that he did follow the directions of Col. Robinson?

A. It looks that way now."

Whereupon the counsel for plaintiff did then and there object to the admission of this answer, and insisted that the same be not allowed in evidence, for the reason that it was a conclusion of the witness arrived at from subsequent developments, and his honor,

the said judge, then and there sustained said objection and excluded said testimony.

Whereupon the counsel for the said defendant did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

26 Thereupon the witness testified further, as follows :

" Q. Then you say that it now appears, from the knowledge which you have subsequently obtained, that Col. Robinson dominated to a large extent the policy of the business done at that time ?

A. I know he had the policy of Mr. Bush, but I don't know as he had it to a large extent."

Whereupon the counsel for plaintiff did then and there object to the admission of the testimony, and insisted that the same be not allowed in evidence, for the reason that it was a conclusion of the witness arrived at from subsequent developments, and his honor, the said judge, then and there sustained said objection and excluded said testimony.

Whereupon the counsel for the said defendant did then and there propose his aforesaid objection to the ruling of the said court, and prayed that his bill of exception might be sealed, and it was sealed accordingly.

Thereupon the witness testified further, as follows :

" I have no recollection of any particular time that Col. Robinson obtained discounts at the bank. I know that he did obtain discounts. The course of business pursued by him in relation to the bank when he obtained discounts upon paper was usually to submit it to the board of directors. I don't remember any paper having been submitted to the board of directors. They handed it to the other directors ; I wasn't here in the city. No, I am unable to state that any particular paper was submitted to the board of directors in my presence. I never had any knowledge of a note made by George M. Israel, dated May 4th, 1893, for \$17,000, payable

27 on demand to the order of the Elmira national bank. I never had any knowledge of the paper of the other defendants in like suits whom we have already mentioned, viz: Bowers, Mollenhauer and Roll. If this note of the defendant in this suit, and the notes of the defendants in the other suits were ever submitted to the board of directors, it was done when I was not present.

Q. I understood you to say that the paper discounted by Col. Robinson was usually submitted to the board of directors ; do you mean to say the paper was submitted to the board while in session ?

A. No.

Q. In what way ?

A. They met at the bank and looked the matter over ; not in full session.

Q. Who met ?

A. The finance committee.

Q. Who were they ?

A. I can't mention the names of that committee today.

Q. Then you don't mean to say that the paper was ever submitted to the board of directors while in session?

A. No.

Q. And you mean to be understood that it was submitted to the board of directors through the finance committee?

A. Yes, sir.

I had knowledge through Mr. Bush and my son of any of the paper which was discounted by Col. Robinson either on behalf of himself or of the company of which he was president. I heard of no particular paper through them, the gross amount was the main thing; I didn't have the details. Col. Robinson usually obtained discounts through Mr. Bush and the finance committee. I don't think that all of the paper discounted by Col. Robinson or at his request, or for his benefit, or for the benefit of the Elmira Municipal Improvement Company was submitted to the finance committee."

Being cross-examined by the attorney for the plaintiff, the witness testified, among other things, as follows:

28 "I think that the same finance committee served during the whole of my term. I can't remember the date when I commenced in my office; I can look it up. It was less than two years. I was elected the second time. My absences during the period I held the office of president were from one week to three months. In all, half of my time was spent away from Elmira; six months in Elmira and six months out of Elmira. Every day while I was in town and my health was proper I managed the business of the bank just the same as I manage my own business. I look over the general business run of it. I did talk with the cashier. I attended every meeting of the board of directors when I was in the city. During all this period during which I served as president there was no paper discounted there to my knowledge and with my consent which was not valid bankable paper. I never knowingly allowed D. C. Robinson or the Municipal Improvement Company to obtain loans from the bank beyond the limit of discount that I have mentioned. I have not the letter I spoke of from the Comptroller of the Currency concerning an overdraft; I passed it into the bank to Mr. Bush; the bank has it, or ought to have it. That remained in the possession of the bank so far as I know. I have not seen it since. The notes found in the bank at the time of its failure were not submitted to the finance committee in my presence. I never had knowledge of any improper or irregular paper being presented to the committee. I went to New York the 1st of May, and came back the 19th of May. The failure was on the 23d of May. I got home just before."

Being further examined by the attorney for the defendant the witness testified, among other things, as follows:

"I never knew anything about that note (the note in suit) before today only what I have seen with Mr. Davis, the receiver; I never saw the note. Why I spoke of it not being good paper is that all

29 I know of it is recently; since it came into the receiver's hands; previous to that I knew nothing about it. I did not know anything about the paper given by John A. Bowers. I did not look over at all the individual notes which have been discounted at the bank. There was a committee for that business. And then I would talk with the committee. I manage my own personal business that way. I ask my partner what notes he has and how they stand; I never look at them, don't know whether I have a note or not. My information is that Mr. Bush, Col. Robinson and my son told me that everything was solid. I did not know anything about any notes in the bank by individually looking at the notes; I didn't go through the details. I couldn't tell you whose notes were in the bank. I got it from information from those whose duty it was to look after them, and if Col. Robinson and Mr. Bush were able to convince the finance committee that notes which Col. Robinson put in the bank for discount were good notes and the committee told me that they were good, I had to be satisfied. I do not know whether the finance committee had any knowledge of this note of defendant nor about the notes of the other defendants, Bowers, Roll and Mollenhauer; it was their duty to look after them; that is what they were nominated for. I do not know that these notes or any of them were ever submitted to the finance committee. I inspected the books personally every day I was home. I inspected the balance-sheet only. There was nothing in the balance-sheet that would show whose notes were in that bank. I was not in the habit of inspecting any books of the bank which would show the personnel of those who had discounts at the bank. My examination of the books was restricted to looking over the balance-sheet and talking with the officers of the bank. So far as my examination of the books was concerned it might have been possible for that balance-sheet to be so broad that any overdrafts

30 would be apparently covered by the means of notes rediscounted which were absolutely worthless. My information as to the amount of loans given to different customers of the bank was restricted to an examination of the balance-sheet and to talking with the officers of the bank, with Mr. Bush and my son and Mr. Wyckoff. I never asked Colonel Robinson what loans he had at the bank. I asked Mr. Bush very often the amount of the loans obtained by Colonel Robinson at the bank; I should say once in two or three months. Colonel Robinson always received loans within the limit, \$20,000. I am positive that I frequently asked, and that, except this one time of overdraft, the amount, either in his own account or in the account of the Elmira Municipal Improvement Company, was always within the limit. If the amount exceeded \$20,000 at any one time in favor of Colonel Robinson or the municipal company I did not know anything about it.

Q. You were deceived if the amount of the loan exceeded the limit?

A. As the boys say, that is about the size of it. I relied principally upon Mr. Bush, the cashier, concerning the individual liability to pay of those who made paper in the bank. I suppose that all

those notes were submitted to the finance committee. That was the order of business of the bank and the duty of the finance committee to pass upon. Paper was brought to the cashier and by him submitted to the finance committee, then when I talked with the finance committee and also with the cashier I had informed myself, so far as I considered it my duty concerning that paper, what they reported to me good, such and such, and the amount. I was satisfied; the directors were generally satisfied with Mr. Bush at that time. The finance committee acted with him. I had their confidence. I had no reason at all to suppose there was any paper there in the bank at the time the bank closed business that the
 31 finance committee had not passed upon. I thought every dollar of that was solvent until I saw some with Mr. Davis, as receiver, and talked with different parties about it.

Q. What reason have you now to suppose that there ever was any such paper?

A. From what I have seen with Mr. Davis, as receiver and with talking with different parties about it.

Q. From what you have heard and seen since the bank closed its doors, you are led to suppose there was such paper?

A. Yes, sir; that is the way it is.

Q. Then you are now satisfied, are you not, Mr. Richardson, that the course of business was not followed in all cases, and that paper was discounted at that bank without being submitted by the cashier to the finance committee?

A. Since the bank has passed into the receiver's hands it looks that way very much."

JOHN J. BUSH, who, being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I am a bank cashier. I was cashier of the Elmira national bank for over three years prior to its suspension. I was cashier of the bank in November, 1892, and from that time down to May 23d, 1893. I know Col. D. C. Robinson. He was a director of the bank while I was cashier. During that period we had a finance committee. The finance committee in November, 1892, had been elected in January, '92.

On motion of J. H. Clark the assessment committee was made up of L. H. Drake, E. L. Wyckoff in connection with the president and cashier of the bank. The examining committee, Judson H. Clark, J. B. Coykendall and Jackson Richardson. Those committees held offices until the appointment of their successors January 10th, 1893. The following became members of the loan committee for 1893, in addition to the officers of the bank: E. L. Wyckoff and L. H.

32 Drake. That was the same membership of the finance, or, as they called it, the loan committee, as the year before. We called the finance committee the loan committee. In 1893 R. T. Peck, J. B. Coykendall and Frederick H. Richardson constituted the examining committee. I don't know as I can give you their duties in detail. There is a section numbered twenty-six of the by-laws that shows the examining committee (reads): 'Section

number twenty-six. There shall be appointed by the board of directors a committee of three, whose duty it shall be to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, to count the cash and compare the assets and liabilities with the accounts of the general ledger, ascertain whether the accounts are correctly kept and the condition of the bank and correspondence therein, and whether the bank is in a sound and solvent condition, and to report to the board such changes and the manner of doing business, &c., as shall seem to be desirable; the result of which examination shall be reported to the board at the next meeting thereof.' That section is headed 'Examinations.' I should say, then, that it refers to the examining committee. Here is clause number nineteen (reads): 'There shall be a committee, to be known as the exchange committee, consisting of the president, cashier and directors appointed by the board every twelve months, to continue to act until their successors are appointed, to have power to discount, purchase bills, notes and other evidences of debt, and to buy and sell bills of exchanges.' It is called the exchange committee there in that section. I don't know of the bank ever having an exchange committee. I haven't any knowledge excepting from the books, whether it was intended

33 that the committee which I have termed the loan committee should be governed by this section which I have just read.

We had a very few customers that were borrowing to their limit on accommodation paper.

Mr. Robinson had some \$19,000 of his individual paper in the bank. If he had \$19,000 of his own paper at the bank, and the Bowers paper was used for his benefit, he would not exceed the amount to which he was entitled. He was entitled to \$20,000 on paper signed by himself.

Q. And there was no limit to the amount of discount he might obtain if the paper was signed by anybody else?

A. Yes, sir.

Q. So he could evade the rule and obtain unlimited discounts at the bank if he had paper signed by any one but himself?

A. He was limited by the board.

Q. So far as your rule was concerned?

A. As I understand it, they were to take paper of their customers for such amount as they saw fit.

Q. So no man was limited to \$20,000 discount except on his own paper?

A. He was limited to \$20,000 on his own paper.

Q. So it would be possible for a man to obtain \$100,000 by presenting paper signed by other people?

A. It would be possible for customers of the bank to present paper taken by them from their customers and discounted at our bank to such an amount as the bank officers saw fit to accommodate them.

I don't recollect the date when I first saw this paper of John A. Bowers. I don't remember who was present. My recollection would be, it was presented by Mr. Richardson. We had no such rule in our bank as to its being presented to the committee. The

committee took charge of the loans as they found them, and requested the cashier to increase them or diminish them as they saw fit. I have no recollection of what occurred when this note
 34 was presented for discount. I have no recollection as to whether or not it was presented to any other person or officer of the bank other than myself. Any paper that came into the Elmira national bank payable to my order as cashier I would endorse for collection. I don't recollect making any inquiries as to who John A. Bowers was. I said Colonel Robinson had a line of paper for \$19,000 in the bank, as to what date it was I don't know. I am unable to say how much discount he had obtained in the bank on his own paper at that time. I don't know of any books excepting those in possession of the receiver. Whether or not he has \$20,000 or less I would not be precluded under the practice of the bank from giving him credit for any other paper brought in by him which in my judgment was bankable paper. I never knew of John A. Bowers being a customer of the bank. I do not recollect ever hearing of him until the paper was presented. I have no recollection what inquiries I made about him. I will not swear I made any. I should say that I first heard of the defendant, George M. Israel, on May 4th, 1893. I first saw a note of \$17,000, dated May 4th, 1893, signed George M. Israel, when it was presented to me at our bank by Mr. Robinson. I don't recollect that it was presented to any one else. Mr. Robinson said he would like to have that with two others placed to his credit. My recollection is that the two others were the notes of Frederick H. Mollenhauer and Henry S. Roll. My recollection is that he said they were able to pay the notes. I have no recollection of having seen the gentlemen or knowing them prior to the presentation of the notes. I think they never had paper in the bank prior to that. I never made any inquiry as to the responsibility of these men from anybody else than Colonel Robinson.

On the night of May 3d he (Col. Robinson) closed with an overdraft of \$35,400.60. At the close of business on the night of
 35 May 2d his account showed an overdraft of \$70,894.35. At the close of business May 1st, overdraft of \$64,304. Close of business April 28, overdraft \$89,505.55. \$62,314 on April 27. April 25th, \$137,314.00. April 24, \$63,214.30. 23d, \$38,594.31. 22d, \$47,591.53. 20th, the next business day, \$16,789.94. 19th, close of business, \$20,707.69. 18th, credit of \$5,423.46; the next day, \$7,876.14 overdraft. 16th, \$52,876.14 overdraft. \$19,376.14 overdraft at close of business on April 14th. At the close of business 13th, \$52,376.14 overdraft. At the close of business the 12th, \$29,829.04 overdraft. April 11th, \$36,881.80; the 10th, \$2,996.00; close of business on the 9th, \$6,722.18; on the 7th, \$4,792.82 credit; \$52,718 overdraft on the 6th. Close of the 5th, \$13,046.31 overdraft; close of the 4th, \$31,426.31 overdraft. April 3d, \$24,410.81 overdraft; April 2d, \$20,210.81; March 31st, \$37,492.68; March 30th, \$73,592.68; the next day, \$77,567.17; March 28th, \$98,512.23; 27th, \$79,481.98; 26th, \$60,677.39; 24th, \$45,677.39; 23d, \$31,796.31; 22d, \$40,781.39; 21st, \$42,781.39; 20th, \$25,281.39; 19th, \$56,494.37;

18th, \$55,958.87; 16th, \$23,283.03; 15th, \$28,315.51; 14th, \$29,105.34; 13th, \$15,510.09. I would like to say in connection with that overdraft that Mr. Robinson notified us that his account was not overdrawn according to his books, and that we had charged some items to his account that were not properly entered there, and he wanted us to balance up his book. We told him at any time he would like to have his book balanced up we would. I don't think the officers and directors of the bank would allow that overdraft to continue the weeks it did unless they had some grounds for the belief that there was an error in books that would show him with such an overdraft. I do not know what grounds they had for that belief. We couldn't get his books; we balanced our own books. There

was an item that has been shown since, whose amount I
36 don't know, that was a foundation for such a claim as this.

I wouldn't say that I believed that such an amount as \$137,314 overdraft on April 25th, 1893, could have been credited to one account and drawn upon another by error. I simply said that much as I considered it my duty to say. I think Frederick H. Richardson, of the examining committee, knew of that overdraft on the books. I wouldn't swear I knew any of the others who did; my impression is that Mr. Wyckoff was aware of it; I wouldn't say that he was. There certainly was an overdraft that showed there
• weeks and weeks. At the close of business May 3d there was an overdraft of \$35,400.60.

Q. And the next day you permitted him to discount paper about which you knew nothing, the makers of which you had never heard of, amounting to an aggregate of \$54,000, did you?

A. Yes, sir.

Q. And you did that upon your confidence of the responsibility of Colonel Robinson alone, did you not?

A. No, sir.

Q. Upon whose responsibility did you depend?

A. I considered the responsibility of the party, I. B. Newcombe & Co.

Q. Are I. B. Newcombe & Company parties to this paper, any of it?

A. No, but I saw a letter in which Mr. Robinson said he had received that paper from those people.

Q. Let me see that letter.

A. Mr. Robinson has it.

By Mr. SICARD:

Q. Was that the letter that was photographed?

A. Yes, sir.

By Mr. SMITH:

Q. Where is the photograph of it?

A. I haven't got it.

Q. Can you get it?

A. I presume I can get it.

37 By Mr. SICARD :

Q. Did you read the letter ?

A. I don't remember but seeing the head of it.

Q. Did you read it at any time ?

A. Yes, sir.

This is taken outside of the stipulation, and waiving all objections to it.

By Mr. SMITH :

Q. State the contents of that letter.

A. I wouldn't want to state the contents of a letter I hadn't seen in two years and a half.

Q. State your best recollection of that letter.

A. To my best recollection the letter recited that the enclosed notes were sent to him, and that it was signed by Mr. Israel ; the form of it I would not be able to say.

Q. The only thing that connected I. B. Newcombe & Company with this was the fact that the letter was written on their letter-head ?

A. Perhaps that was it.

Q. You are sure the letter wasn't signed by anybody else but the defendant George W. Israel ?

A. I wouldn't swear it was signed by anybody else.

Q. Do you recollect the date of this letter ?

A. My impression is it was May 3d, 1893.

Q. To whom was it addressed ?

A. My recollection of it is it was addressed to Col. D. C. Robinson.

Q. Did he say for what purpose he showed you that letter ?

A. I don't recollect as he did.

Q. Did you understand at the time the object he had in showing you that letter ?

A. I didn't connect any special object with it.

Q. When did he show you the letter ?

A. When he gave me the notes.

Q. On the 4th day of May, 1893 ?

A. Yes, sir.

Q. Was the letter anything more than a letter of advice stating that the notes were enclosed ?

38 A. I have given you as nearly as I can recollect the contents of the letter.

Q. Just answer my question.

A. I couldn't say.

Q. Didn't the letter contain any statement that the parties making the notes were solvent ?

A. I couldn't swear as to that.

Q. Can't you swear whether or not there was anything of that kind in the letter ?

A. I have given you my recollection of the letter that they enclosed—

Q. Who enclosed, that the writer enclosed, you mean ?

A. I wouldn't say as to the starting of the letter.

Q. Do you recollect that the letter contained any statement as to the solvency of the makers of these notes?

A. I wouldn't swear it contained any such statement.

Q. Did it contain any statement that these notes were made by the members of the firm of I. B. Newcombe & Company?

A. I submit that you get the letter.

Q. Do you recollect that it contained any such statement?

A. I have no recollection of the contents of that letter beyond what I have given you.

Q. Was there anything in that letter to indicate that the letter was written by a member of the firm instead of the typewriter in the office, as a matter of fact?

A. I was led to believe that that letter was in connection with business Col. Robinson was doing with I. B. Newcombe & Company, and had been doing.

Q. If you were led to believe that, let us know just how you were led to believe that.

A. I don't know as I can tell you just exactly how.

Q. I think it is quite important.

A. I knew Col. Robinson and I. B. Newcombe had had dealings in the past in the transfer of this property, and knew they were interested with one another, and the fact that the paper came up from their office perhaps led me to believe that.

39 Q. And that may have been the sole ground you had for any such belief?

A. I couldn't say that I had any specific ground for saying I knew I. B. Newcombe was interested in that.

Q. And it may have been that the sole reason you had for believing that was that I. B. Newcombe at some time anterior to that had been engaged with some business of Mr. Robinson's?

A. I knew their relations immediately prior to that time had been close.

Q. What business relations had they had immediately before this time?

A. In connection with this property?

Q. What business relations had they had?

A. I suppose, technically speaking, that between broker and client.

Q. Had you known of any business transactions between Col. Robinson and I. B. Newcombe & Co. for many months?

A. I guess they had no other transactions for some time.

Q. For a period of some months?

A. I wouldn't say months.

Q. What other persons in the custom of doing business in your bank would you have permitted to bring in paper made by persons of whom you had never heard, and would have given the amount of credit to that person which you gave in this case, viz., \$54,000?

A. It had been the custom of our bank to take such paper as its customers offered. The officers and directors of the bank when they saw fit to ask the cashier to reduce a customer's line of discount they

notified him to do so, and that cashier did immediately reduce such line.

Q. And is it a fact that they regarded Colonel Robinson in a different light from some of the customers of the bank from the fact that he was a director of the bank?

A. No, sir; if my superiors had ordered me to reduce Colonel Robinson's line I should have done so.

Q. What was Mr. Robinson's line?

40 A. My instructions from my superiors were to take care of Colonel Robinson's account.

Q. What do you mean by that?

A. That he was entitled to such lines of discount as would be necessary to conduct his business here connected with these properties.

Q. Then he had an unlimited amount of discount?

A. No, the loan committee had the power to cut him down. He did not have an unlimited amount of discount, the loan committee had the power to cut him down. There had never been any amount named to any of our customers. I don't agree with you that this line of discount was unlimited. The judgment of my superior officers was the limit. In this case I did not act on my own judgment. I did in this case as in all others. I would not be able to say to what amount I would have taken paper of this kind presented by Colonel Robinson. If I had suspected that a paper was presented by an irresponsible typewriter, I should have notified my superiors; I should have immediately found some of my officers to consult them.

Q. To what amount would you have taken paper that day presented by Colonel Robinson of this character, knowing just as much and no more about this paper than you did?

A. I never had been required to make in my mind an amount that I would take or would not take.

Q. You would have taken \$100,000 just as rapidly, would you not?

A. I don't say that I would.

Q. You don't say that you would not?

A. I don't know, Mr. Smith; I never was presented with that amount of paper.

Q. You may state whether or not that you were influenced to some degree by the fact that there was an overdraft staring you in the face of over \$35,000 by Col. Robinson.

A. No, sir; I don't know as I knew there was an overdraft.

41 Q. You had no suspicion it was any such amount as that?

A. I wouldn't say I hadn't any suspicion, because I knew it was a large amount.

Q. You did know he had a large overdraft of a large amount?

A. From time to time I knew he would overdraw, and he notified us there was an error in his account.

Q. Notwithstanding that overdraft, you took the paper, credited the paper without question?

A. I had no authority to refuse the paper, sir.

My superior officers were the president, vice-president and the ten directors outside of them. No, I don't say that I had instructions from the president, vice-president and the ten directors to let Col. Robinson have such accommodations as he desired at the bank. Mr. Richardson, my president, stated to me that Mr. Robinson was entitled to what accommodations he needed for the carrying out of his business, that he had shown him that he was a very wealthy man. I think in our committee meetings there was more or less discussion of those matters. On January our various committees examined every note that Mr. Robinson had put in the bank; I think they made a report to the department that such loans were satisfactory. I didn't do anything in regard to this loan or any other pertaining to Colonel Robinson different from what I had done before for him or any other man as a customer in the bank. I did not ask Colonel Robinson whether George M. Israel was a millionaire. I did not ask him whether Frederick H. Mollenhauer was a man of affairs and property. I have no recollection of asking Mr. Robinson as to the responsibility of that paper. I knew Colonel Robinson was a director in our bank at the time I took this paper. My instructions were such that I would not have a right to refuse to take the paper of our directors to that amount. If a man were a director and presented paper to that amount I would have no more right to take it than if he were any other customer. I would not take this amount from any person if I knew he was not responsible.

I don't know of any other customers on our books who had ever presented paper to us the makers of which I did not know, without any signature at all except his own and without any endorser. If any of our customers who were doing business and required that line of discount and they brought us paper, it would make no difference. There never was any other man who came to our bank with paper of \$54,000 made by unknown makers, and I would not know until such a question came up to me how I would decide it. In several other cases we permitted our customers to bring in paper made by persons we didn't know and who did not endorse that paper themselves. We presented these notes to the makers at New York. If the makers hadn't paid them I should look to Col. Robinson. I believed the makers would pay them, and I should have looked to Col. Robinson if they had not, although he didn't endorse them, and although we didn't have any legal claim on him, we should look to him to pay the notes."

DAVID C. ROBINSON, who, being first duly sworn, testified, among other things, as follows:

"I reside in Elmira. I am a lawyer. My connection with the Elmira Municipal Improvement Company commenced in April, 1892, and lasted until about May 23d, 1893. During the latter part of this period I was also a director of the Elmira national bank, and was using large sums of money for the organization of the Elmira Municipal Improvement Co.; the adjustment of its properties and the purchase of additional properties for it, the purchase of its

43 securities; and the retirement of its obligations, besides large building operations. I kept an account at the Elmira national bank. There was a dispute between me and the bank, dating from about August 1, 1892, as to whether or not my account was overdrawn.

Q. State briefly the dispute between the parties.

A. The cashier had said to me there was an overdraft. I said I didn't see—I am giving the substance—I didn't see exactly how that could be, that we must get together and balance the account, which had not been balanced for some weeks then, and he said, and I agreed with him, that that would be an all night's job when we got at it, the checks being very numerous, and in the course of my duties as mayor of the city, president of the Municipal Improvement Company, and in the practice of my profession, and the management of a large number of estates and trusts, I was so busy that I hadn't time to get at the ground of difference. I said I would endeavor to keep the account good until we could adjust the errors. That is practically the talk.

Q. Did the cashier at that time advise you of the amount that he claimed your account was overdrawn?

A. Once or twice I think he did, but I think not at any time exactly; I think his expression was, 'We want so much to make our figures good.'

Q. What did he say he wanted?

A. About so much deposited.

Q. Did he say any particular amount?

A. No; I think not; I think he said, 'We need so much to make your account good.'

Q. But say about May 4th, 1893, what did he say he wanted to make the account good?

A. I think that some little time prior to that there had been a discussion as to whether the account was or was not overdrawn, and at that time he had a pretty large figure, some forty or fifty thousand dollars as the figures of their overdraft which I couldn't understand, and I told him I would send him in some cash and
44 securities, or both and keep it along until we could get at it and straighten the account up.

Q. Then when it was claimed by the cashier that there was an overdraft against you that you obtained the paper of the defendant George M. Israel, was it not?

A. Yes, sir; it was about that time.

Q. And also the paper of Frederick H. Mollenhauer, Henry S. Roll, and John A. Bowers?

A. Yes, sir.

These notes were used at the Elmira national bank, and the proceeds, I understood, were credited to my account, at the time it was claimed by the bank there was an overdraft. I don't know whether the defendant or any of the others received any consideration at the time I obtained their paper; they didn't receive anything directly from me. The amount of other notes wiped out the overdraft, and made a balance. I am not stating positively, because I don't re-

member whether the amount of the overdraft was spoken of to me or not. I executed a paper purporting to be a guaranty of those notes and some other paper, long afterwards. (Paper shown witness.) That is the paper."

Whereupon the attorney for the defendant offered the said paper, and read the same in evidence as follows:

"For value received I hereby guaranty the payment and collection of the following named promissory notes to the Elmira national bank or its assigns: The Cortland Corset Manufacturing Company, dated October 31, 1892, due five months after date, \$2,500. Note, same maker, same date, due in three months, \$4,000.

D. C. ROBINSON."

"And in like manner guaranty the following, to wit: Note to John M. Bowers, dated March 14, 1893, \$18,000, at four
45 months. Note of George M. Israel, dated May 4, 1893, \$17,000, on demand. Note of F. A. Mollenhauer, dated May 4, 1893, \$18,000, on demand. Note of H. S. Roll, dated May 4, 1893, \$19,000, on demand. Note of J. M. Robinson, Sons & Company, May 4, 1893, \$12,250.

Dated Elmira, May 4, 1893.

D. C. ROBINSON."

"This guaranty was executed about May 20, 1893. The bank passed into the hands of the plaintiff, as receiver, about May 26, 1893. The aggregate amount of the so called Robinson paper in the bank was about \$300,000, and of the so-called Bush paper was about \$107,000."

Q. Something was said about what was called the Robinson paper while you were under examination, and about the Bush paper. What did you mean by Robinson paper?

A. I mean the paper that the receiver and the comptroller called Robinson paper.

Q. That won't enlighten the court when we get before the court. What was the character of the paper; what made it Robinson paper; paper that had your name on?

A. That is just what I don't mean. I mean the Municipal Improvement Company paper, although not endorsed by me, was called Robinson paper; I mean the Elmira Water Works Company paper, although not endorsed by me was called Robinson paper; I mean the paper of the Elmira Gas & Illuminating *paper* was called the Robinson paper; I mean the paper of the Cortland Corset Manufacturing Company was called Robinson paper; I mean the paper of these gentlemen, Israel and others, was called Robinson paper, and I mean to say that an alleged overdraft was called Robinson paper; I mean to say that a draft on the Chase national bank of twelve thousand dollars was called Robinson paper.

46 Q. And all those were so called because they were matters in which you personally were either endorser or guarantor, or had received the money directly or indirectly?

A. I don't know what the reason was; I only know they classified it, and called certain paper Robinson paper.

Q. What was the Bush paper?

A. I couldn't begin to tell you what that was; I don't know. The notes made by members of his family which had come to the bank through him, and which were classified in that way.

WILLIAM B. EDSON, who, being first duly sworn, testified, among things, as follows:

"I reside in Elmira; my occupation is book-keeper in the Elmira City bank, of which Mr. J. J. Bush is the cashier. I was employed as book-keeper in the Elmira national bank from 1889 or 1890 until the closing of the bank. The writing in the body of the note for \$17,000 made by the defendant, the note for \$19,000 made by Henry S. Roll and the note for \$18,000 made by Frederick H. Mollenhauer is in the handwriting of more than one person. I recognize the writing designating the place where the notes are made payable, being the words "Elmira national bank," as the handwriting of E. A. P. Smith who was assistant cashier of the bank at that time. I first saw these notes during the day of May 4, 1893, in the basket that was supposed to contain notes, discounts, and all papers for the day's business and for the ledger, and Mr. Bush left instructions that those notes be discounted and placed to Mr. Robinson's account on that day. Mr. Bush went away on the night of the fourth and therefore they were placed to Mr. Robinson's credit the next day, the 5th. I had already entered them upon the books as of May 5th and I erased those entries, and substituted therefore

47 May 4th by the direction of Mr. Bush. The order was given to me by Mr. Smith, who received orders from Mr. Bush in New York by telephone. There was an overdraft of \$35,000 against Mr. Robinson upon the books of the bank, on the morning of May 4th. There were items coming through the exchanges that amounted to about \$73,000, and there was a deposit made of \$33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night about \$50,000 if it had not been for the entry on the books of the proceeds of these notes. Colonel Robinson was in New York at the time Mr. Bush telephoned from New York to the bank. On May 4th, 1893, Colonel Robinson's personal notes amounted to \$19,000, and the notes upon which he was endorser \$34,000. I do not include in these amounts the paper of the defendants in these suits or the amount of the overdraft."

And thereupon the defendant rested his case.

Whereupon the plaintiff's counsel asked the court to direct a verdict in favor of the plaintiff. The attorney for the defendant objected to a direction of a verdict in favor of the plaintiff, and asked the court to submit to the jury the question, whether upon the evidence in the case the note given by the defendant had been diverted from the purpose for which it was obtained from and given by the de-

fendant, which the court refused, and the attorney for the defendant duly excepted.

The attorney for the defendant also requested the court to submit to the jury the question whether under all the circumstances proved in the case the Elmira national bank took the said note in good faith, relying upon the contract of the defendant to pay the same; and also the question whether or not said bank had notice or was
48 put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank, and if put upon its inquiry whether said bank would have ascertained the fact that there was no consideration for the said note and that it could not recover upon the same. The court denied each of the said requests so made on behalf of the defendant, and the attorney for the defendant duly excepted.

The defendant's attorney thereupon asked to have submitted to the jury the question whether in view of the erasure of the entry of the said notes upon the books of the bank first made on May 5, 1893, and the entry of the same as of May 4, 1893, by the order of its cashier the said bank acted in good faith, without notice of any infirmity in said note, and became a *bona fide* holder thereof for value, and whether the fact of such erasure is not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the paper under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of the said note from the payee, the said bank, or from said Robinson.

The court denied each of the said requests so made on behalf of the defendant, and the attorney for the defendant duly excepted.

Whereupon the court directed a verdict in favor of the plaintiff and against the defendant and addressed the jury as follows:

"GENTLEMEN OF THE JURY: I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the maker upon an accommodation note. As I look at it now I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of \$17,000 and interest, which counsel can agree upon;" to which direction of a verdict in favor of the plaintiff the attorney for the defendant duly excepted.

49 It was agreed by the attorneys for the respective parties that interest should run upon the note in suit from the date of the beginning of the action.

The jury thereupon rendered a verdict in favor of the plaintiff and against the defendant in the sum of \$17,000, with interest from the date of the beginning of the action, to wit, the 13th day of August, 1895.

The attorney for the defendant, who is also the attorney for the defendants in each of the two actions now pending, wherein the said receiver is plaintiff and Frederick H. Mollenhauer and John A. Bowers are defendants, respectively, agreed in open court that should the appellate court sustain the decision of the court in this action

he will allow judgment to be entered in said action without proceeding with the trial thereof.

And forasmuch as the facts aforesaid, and the decisions of the court thereon, do not appear of record, the defendant prays that this his bill of exceptions may be allowed, and the same is allowed and ordered to be filed on February 7th, 1896, at the term during which the verdict was rendered.

N. SHIPMAN,
Circuit Judge.

It is hereby stipulated that the foregoing bill of exceptions be allowed and filed.

BISSELL, SICARD, BISSELL & CAREY,
Attorneys for Plaintiff.
FRANK SULLIVAN SMITH,
Attorney for Defendant.

Endorsed: U. S. circuit court, southern dist. of New York. Charles Davis, as receiver of the Elmira national bank, plaintiff, against George M. Israel, defendant. Bill of exceptions. Frank Sullivan Smith, attorney for defendant, No. 54 Wall street, New York, N. Y. U. S. circuit court. Filed Feb. 7, 1896. John A. Shields, clerk.

50 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES DAVIS, as Receiver of the Elmira Na-	} Bond for Costs.
tional Bank,	
<i>vs.</i>	
GEORGE M. ISRAEL.	

Know all men by these presents that we, George M. Israel, as principal, and Frank Sullivan Smith and John Byrne as sureties, are held and firmly bound unto the above-named Charles Davis, as receiver of the Elmira national bank, in the sum of two hundred and fifty dollars, to be paid to the said Charles Davis, as receiver, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eighth day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named George M. Israel has prosecuted an appeal to the circuit court of appeals of the United States for the second circuit to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named George M. Israel shall prosecute such appeal to effect

51 and answer all costs, if he shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

GEO. M. ISRAEL.

FRANK SULLIVAN SMITH.

JOHN BYRNE.

[SEAL.]
[SEAL.]
[SEAL.]

Sealed and delivered and taken and acknowledged this eighth day of February, 1896, before me.

FREDERIC H. RIDGWAY,

[SEAL.] *Notary Public (100), City and County of New York.*

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.

Frank Sullivan Smith and John Byrne, being duly sworn, depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

FRANK SULLIVAN SMITH.

JOHN BYRNE.

Sworn to this eighth day of February, 1896, before me.

FREDERIC H. RIDGWAY,

[SEAL.] *Notary Public (100), City and County of New York.*

Endorsed: U. S. circuit court, southern district of New York. Charles Davis, as receiver of the Elmira national bank, vs. George M. Israel. Bond for damages and costs on writ of error. Approved Feb. 10, 1896. E. H. Lacombe, U. S. circuit judge. U. S. circuit court. Filed Feb. 10, 1896. John A. Shields, clerk.

52 United States Circuit Court, Southern District of New York.

CHARLES DAVIS, as Receiver of the Elmira National Bank, }
Plaintiff, }
against }
GEORGE M. ISRAEL, Defendant.

Assignment of Errors.

And now comes the said George M. Israel by Frank Sullivan Smith, his attorney, and says, that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the circuit court of the United States for the southern district of New York erred in refusing to submit to the jury in accordance with the request of the attorney for the defendant, the question whether upon the evidence in the case the said note given by the said defendant had been diverted from the purpose for which it was obtained, to wit, to enable the said D. C. Robinson to obtain money

from the proceeds of said note with others given at the same time and in the same manner wherewith to build a power-house at Elmira, N. Y., for the use of the corporation of which said Robinson was the president, and in which the firm by which the defendant was employed were interested, and said note was used for a different purpose, to wit, to apparently make good or cover up
53 an overdraft of the said Robinson of long standing at the said Elmira national bank.

II.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether under all the circumstances proved in the case the Elmira national bank took the said note in good faith, relying upon the contract of the defendant to pay the same.

III.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether or not said bank had notice or was put upon its inquiry as to whether there was any consideration passing to the defendant from either said Robinson or the payee named in said note, the said bank; and if put upon its inquiry, whether said bank would have ascertained the fact that there was no consideration for said note, and that it could not recover upon the same.

IV.

That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether, in view of the erasure of the entry of the said notes upon the books of the bank first made May 5th, 1893, and the entry of the same as of May 4, 1893, by the order of its cashier, the said bank acted in good faith, without notice of any infirmity in said note and became a *bona fide* holder thereof for value.

V.

54 That said court erred in refusing to submit to the jury, in accordance with the request of the attorney for the defendant, the question whether the said fact of such erasure was not a circumstance tending to show the guilty complicity of the said cashier with the said Robinson in taking the said note under such circumstances as would point to his knowledge of the fact that there was no consideration passing to the maker of said note from the payee, the said bank, or from said Robinson.

VI.

That said court erred in instructing as follows: "Gentlemen of the jury, I cannot see anything in the facts of this case which legally take it out of the ordinary rule with regard to the liability of the

maker upon an accommodation note. As I look at it now I cannot find any material question of fact to submit to you, and you are therefore directed to render a verdict for the full amount of \$17,000, and interest, which counsel can agree upon."

VII.

That said court erred in directing a verdict in favor of the plaintiff and against the defendant for the amount of said note.

Wherefore the said defendant George M. Israel prays that the judgment of the said circuit court of the United States for the southern district of New York be reversed.

Dated February 7th, 1896.

FRANK SULLIVAN SMITH,

Attorney for Plaintiff in Error,
No. 54 Wall Street, New York, N. Y.

(Endorsed:) U. S. circuit court, southern district of New York.

Charles Davis as receiver of The Elmira National Bank, plaintiff, against George M. Israel, defendant. Assignment of errors. Frank Sullivan Smith, attorney for defendant, No. 54 Wall street, New York, N. Y. U. S. circuit court. Filed Feb. 10, 1896. John A. Shields, clerk.

55 UNITED STATES OF AMERICA, ss:

To Charles Davis, as receiver of the Elmira national bank, Greeting:

You are hereby cited and admonished to be and appear at a stated term of the circuit court of appeals for the second circuit, to be holden at the United States court and post-office building, in the city of New York, on the 10th day of March, eighteen hundred and ninety-six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George M. Israel is plaintiff in error, and Charles Davis, as receiver of the Elmira national bank, is defendant in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

E. H. LACOMBE,

Circuit Judge.

(Endorsed:) U. S. circuit court, southern dist. of New York. George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, defendant in error.

56 Citation on appeal. Frank Sullivan Smith, attorney for plaintiff in error, No. 54 Wall St., New York, N. Y. Due service of a copy of the within citation on appeal is hereby admitted, dated February 11th, 1896. Bissell, Sicard, Bissell & Carey, att'ys for def't in error. U. S. circuit court. Filed Feb. 14, 1896. John A. Shields, clerk.

56a United States Circuit Court of Appeals for the Second Circuit.

GEORGE M. ISRAEL, Plaintiff in Error,	}
<i>against</i>	
CHARLES DAVIS, as Receiver of the Elmira National Bank, De-	}
fendant in Error.	

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above entitled cause that Charles F. Gale, receiver of the Elmira national bank, be substituted as defendant in error in said cause in the place and stead of Charles Davis, deceased, and that an order to that effect may be entered by the solicitor for either party upon this stipulation and consent without notice.

Dated Aug. 5, 1896.

FRANK SULLIVAN SMITH,
Attorney for Plaintiff in Error.
 BISSELL, SICARD, BISSELL &
 CAREY,
Attorneys for Defendant in Error.

Ordered accordingly.
 E. H. L.

(Endorsed :) U. S. circuit court of appeals for the second circuit. George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, defendant in error. Stipulation and order. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall street, New York, N. Y. United States circuit court of appeals, second circuit. Filed Aug. 10, 1896. James C. Reed, clerk.

57 United States Circuit Court of Appeals for the Second Circuit,
 October Term, 1896.

Submitted November 20, 1896; decided December 8, 1896.

GEORGE M. ISRAEL, Plaintiff in Error,	}
<i>vs.</i>	
CHARLES F. GALE, as Receiver of the Elmira National Bank, Defendant in Error.	} No. 23.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

WALLACE, *Circuit Judge* :

This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon a verdict directed by the court. The assignments of error raise the question whether the trial judge was justified in withdrawing the case from the consideration of the jury and instructing them to return a verdict against the defendant.

The action was brought by the plaintiff as the receiver of the

Elmira national bank to recover the amount of a promissory note for \$17,000, dated May 4, 1893, payable to the order of the bank, and signed by the defendant. The defense was that the note was made and delivered by the defendant to one Robinson without consideration, and that the bank had notice of the facts and never became a holder for value. The defendant further insisted upon the trial, although no such defense was alleged in the answer, that the
58 note was delivered to Robinson for a special use and was wrongfully diverted by him from the purpose for which it was given.

Upon the trial the evidence was that on or about the day of the date of the note Robinson applied to the defendant, who was a stenographer and typewriter in the employ of the firm of Newcombe & Co. of New York city, and to several of the clerks of that firm, to lend him their names upon accommodation paper to be used by him with the Elmira National bank. He stated that he had exceeded his line of discount at the bank; that he was building a power-house at Elmira and needed some money for that purpose; and that if the defendant and the clerks would give him their notes he would take care of them, and it would enable him to effect his object. Thereupon the defendant signed and delivered to Robinson the note in suit, and the clerks respectively signed and delivered to Robinson their notes as requested by him. Robinson forwarded all the notes to the bank, and the day after receiving them the bank credited him with the aggregate face amount thereof, being \$54,000. Robinson was a director of the bank, and his account was and had long been heavily overdrawn. When credited with the amount of the notes his account was overdrawn at least \$50,000. Neither the defendant, nor any of the clerks from whom Robinson obtained the accommodation paper, had any financial interest in Robinson's building or other business affairs. They supposed him to be a man of large means who could and would see that the notes were paid without recourse to them.

Assuming that there was enough in the circumstances attending the reception and discount of the paper by the bank to charge it with notice that the note in suit was an accommodation note made for the benefit of Robinson, and without other consideration, the bank was a purchaser for value and entitled to enforce it against the maker. That it was a purchaser for value, although it did not advance any money upon the note, but merely gave Robinson credit for the amount upon his precedent indebtedness, is entirely
clear upon the authorities which prevail in this court. *Swift*
59 *vs. Tyson* (16 *Peters*, 1); *National Bank of the Republic vs. Brooklyn City Railway Co.* (14 *Blatch.*, 242), affirmed 102 U. S., 14.

Accommodation paper is put into circulation for the purpose of giving credit to the party for whose benefit it is intended, and although he cannot maintain an action upon it against the accommodation maker or endorser, and would be defeated because of want of consideration, a purchaser can do so who acquires it while still current and gives the credit it was intended to promote, al-

though with knowledge of its original character. *Jewett vs. Holden* (1 Woods, 530); *Smith vs. Knox* (3 Esp. R., 46). As to the purchaser it is in effect a letter of credit, and when he gives credit upon it a sufficient consideration arises to support the promise of the accommodation maker or endorser. *Violett vs. Paton* (5 Cranch, 142). "Accommodation paper is daily placed in the market for discount or sale, and the endorsee or purchaser who knows that a bill still current was drawn, made, accepted or endorsed without consideration is as much entitled to recover as if he had been ignorant of the fact." 1 *Daniel, Negotiable Instruments*, sec. 790.

The note having been made for the purpose of being discounted by the Elmira national bank, and having been used for that purpose by Robinson, effected the substantial object for which it was designed. Robinson did not promise the defendant, or the makers of the other notes, to use the avails in any particular way; and as none of the makers had the remotest concern in the building of the power-house, or in his disposition of the avails, his statement of the reasons which led him to apply for aid and of the use for which he wanted it, was not of material matter, and could not have been in a legal sense an inducement for the accommodation. The case is quite analogous to *Mohawk Bank vs. Corey* (1 Hill, 513). The evidence was wholly insufficient to charge Robinson with a fraudulent diversion of the paper, and the trial judge correctly refused to submit any issue involving that question to the jury.

60 We find no error in the rulings at the trial and conclude that the judgment should be affirmed.

Frank S. Smith, for the plaintiff in error.

Martin Cary, for the defendant in error.

61 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court and post-office building, in the city of New York, on the 23rd day of March, 1897.

Present: Hon. William J. Wallace and Hon. E. Henry Lacombe, justices.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver of the Elmira National Bank (Substituted for Charles Davis, as Receiver, etc.), Defendant in Error.

A judgment having been duly entered in the above-entitled action in the circuit court of the United States for the southern district of New York, in favor of the defendant in error and against the plaintiff in error, on the 4th day of February, 1896, for the sum of \$17,555.63, and a bill of exceptions having been duly granted and filed in the office of the clerk of said court on the 7th day of February, 1896, and an assignment of errors filed in said clerk's office on the 10th day of February, 1896, and a writ of error granted and citation on appeal issued, and the record and proceedings in said circuit court

having been duly certified to the justices of this court and a hearing thereon duly had on the 20th day of November, 1896, and, after hearing Frank Sullivan Smith, attorney for the plaintiff in error, and Martin Carey, of counsel for the defendant in error, and due deliberation having been had :

62 Now, on motion of Bissell, Sicard, Bissell & Carey, attorneys for the defendant in error,

It is ordered that said judgment be affirmed, and the clerk of this court is hereby directed to issue the mandate of this court to said circuit court of the United States for the southern district of New York accordingly.

E. H. L.

The plaintiff in error hereby waives notice of motion for the issuing of a mandate herein, and hereby consents to the form of the annexed order.

Dated New York, March 17, 1898.

FRANK SULLIVAN SMITH,

*Attorney for Plaintiff in Error, No. 54 Wall Street,
New York, N. Y.*

Endorsed: United States circuit court of appeals. George M. Israel vs. Charles F. Gale, as receiver, etc. Original order of affirmance. Bissell, Sicard, Bissell & Carey, attorneys for def't in error. Office and post-office address, 558 Ellicott square, Buffalo, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 23, 1897. James C. Reed, clerk.

63 Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,
against

CHARLES F. GALE, as Receiver of the Elmira National Bank (Substituted for Charles Davis, as Receiver, etc.), Defendant in Error.	}	Assignment of Errors.
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On the — day of February, 1898, the plaintiff in error (defendant) in this action, in connection with his petition for a writ of error herein to the Supreme Court of the United States, makes the following assignment of errors which he says occurred upon the trial of this cause, and the rendition of judgment therein in the United States circuit court of appeals for the second circuit, to wit :

First. The plaintiff in error assigns as errors the several errors set out in the assignment of errors forming part of the record in the above-entitled action before said circuit court of appeals.

Second. The said circuit court of appeals, before which was heard the writ of error, which brought up the record in this action from the circuit court of the United States for the southern district of New York to said circuit court of appeals, erred in making its order on the 23rd day of March, 1897, affirming the judgment of the said

64 circuit court and directing a mandate to issue to the circuit court of the United States for the southern district of New York, directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. And said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court, and in not directing a new trial of the issues raised by the pleadings in said action.

And said George M. Israel, the plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court for the southern district of New York, and the order entered herein, as aforesaid, by the circuit court of appeals, and the judgment of affirmance to be entered in said circuit court for the southern district of New York upon said order of affirmance, for the error aforesaid and for other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which he hath lost by occasion of said judgment and order.

FRANK SULLIVAN SMITH,

Attorney for Plaintiff in Error,

54 Wall Street, New York, N. Y.

Endorsed : U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, *vs.* Charles F. Gale, as receiver of the Elmira National Bank (substituted for Charles Davis, as receiver, etc.), defendant in error. Assignment of errors. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

65 In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,
against

CHARLES F. GALE, as Receiver of the Elmira National Bank
(Substituted for Charles Davis, as Receiver, etc.), Defendant in
Error. }

Petition for writ of error to the Supreme Court of the United States.

Now comes George M. Israel, the plaintiff in error, and says that on or about the 23rd day of March, 1897, the United States circuit court of appeals of the second circuit rendered judgment herein in favor of the above-named defendant in error (being the plaintiff below) and against the plaintiff in error, affirming the judgment of the circuit court of the United States for the southern district of New York, theretofore rendered and entered herein, against the defendant and in favor of the plaintiff below, in which judgment certain errors were committed to the prejudice of this plaintiff in error; all of which will in more detail appear from the assignment of errors which is hereto annexed and filed herewith.

That this action was brought by Charles Davis, as réceiver of the Elmira national bank, against the plaintiff in error, upon a promissory note for \$17,000, made to the order of said bank by the said plaintiff in error, and that during the pendency in the said circuit court of appeals of the cause said Charles Davis died, and
 66 thereafter the defendant in error, who had been appointed by the Comptroller of the Currency as receiver of said bank, was substituted as a party to this action.

That this is an action at common law by an officer of the United States suing under the authority of an act of Congress, to wit, clause 3 of sec. 629, and clause 4 of sec. 563 of the Revised Statutes of the United States.

That this is a case wherein, according to the act of Congress approved March 3rd, 1891 (26 St. at L., 826), a writ of error may be taken from the circuit court of appeals to this court under the provisions of said act enacting that in all cases other than those specifically mentioned in the 6th section of said act in which the decision of the circuit court of appeals shall be final, and in which category controversies of the nature of this action are not included, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed \$1,000, besides costs.

That the amount of the note sued upon in this case is \$17,000, with interest.

Wherefore this petitioner prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of the errors herein so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court, as by law and the rules and practice of this court made and provided.

FRANK SULLIVAN SMITH,

Attorney for Plaintiff in Error.

(Endorsed:) U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, *vs.* Charles F. Gale, as receiver, etc., defendant in error. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

67 In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,
against

CHARLES F. GALE, as Receiver of the Elmira National Bank
 (Substituted for Charles Davis, as Receiver, etc.). Defendant in Error.

On this 1st day of March, 1898, comes the plaintiff in error and files herein and presents his petition praying for the allowance of a writ of error intended to be urged by him, and praying also that a

transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

Upon consideration whereof I allow the writ of error prayed for, and the clerk is directed to issue the writ of error accordingly.

R. W. PECKHAM,

Associate Justice of the Supreme Court U. S.

Endorsed: U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, vs. Charles F. Gale, as receiver of The Elmira national bank (substituted for Charles Davis, as receiver, etc.), defendant in error. Order allowing writ of error. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

[Endorsed:] U. S. Supreme Court. Israel v. Gale. Copy. Order allowing writ of error.

68 In the Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,	}	Bond.
<i>against</i>		
CHARLES F. GALE, as Receiver of the Elmira National		
Bank (Substituted for Charles Davis, as Receiver, etc.),		
Defendant in Error.		

Know all men by these presents that we, George M. Israel, as principal, and John Byrne and Frank Sullivan Smith, as sureties, are held and firmly bound unto Charles F. Gale, as receiver of the Elmira national bank, in the full and just sum of two hundred and fifty dollars (\$250), to be paid to the said Charles F. Gale, as receiver of the Elmira national bank, his certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a regular term of the United States circuit court, southern district of New York, in a suit depending in said court between Charles H. Davis, as receiver of said Elmira national bank, plaintiff, and George M. Israel, defendant, a judgment was rendered against said defendant for the sum of seventeen thousand five hundred thirty-five dollars and sixty-three cents (\$17,535.63), damages and costs; and

69 Whereas the said George M. Israel duly obtained a writ of error from the United States circuit court of appeals for the second circuit, which court, on the 23rd day of March, 1897, rendered a judgment affirming the said judgment in all particulars; and

Whereas this action was brought by the plaintiff, as receiver of

the Elmira national bank, upon a promissory note made by the defendant directly to the order of the bank for the sum of \$17,000; the defendant in his amended answer admits the execution of the note, but denies that there was any consideration therefor, and alleges in substance that he signed the note at the request of David C. Robinson, a debtor of the bank and who dominated its policy, and that said Robinson used said note in collusion with the cashier of the bank to cover up overdrafts of said Robinson at said bank; that said bank was not the holder of said note in good faith or for value or in the regular course of business; and

Whereas the said George M. Israel has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to said Charles F. Gale, as receiver of the Elmira national bank, citing and admonishing him to be and appear at said Supreme Court, of the city of Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said George M. Israel shall prosecute his said writ of error
70 to effect and answer all costs if he make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. M. ISRAEL.

JOHN BYRNE.

FRANK SULLIVAN SMITH.

[s.]

[s.]

[s.]

Sealed and delivered in the presence of—
FREDERIC H. RIDGWAY.

STATE OF NEW YORK, }
City and County of New York, } ss :

John Byrne, being duly sworn, says that he is a resident and a freeholder within the State of New York and worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

JNO. BYRNE.

Sworn to before me this 21st day of December, 1897.

FREDERIC H. RIDGWAY,

[SEAL.] Notary Public (32), *City and County of New York.*

STATE OF NEW YORK, }
City and County of New York, } ss :

Frank Sullivan Smith, being duly sworn, says that he is a resident and a freeholder within the State of New York and
71 worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

FRANK SULLIVAN SMITH.

Sworn to before me this 21st day of December, 1897.

FREDERIC H. RIDGWAY,

[SEAL.] Notary Public (32), City and County of New York.

STATE OF NEW YORK, }
City and County of New York, } ss.:

I certify that on this 21st day of December, 1897, before me personally appeared the above-named George M. Israel, John Byrne, and Frank Sullivan Smith, known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

FREDERIC H. RIDGWAY,

[SEAL.] Notary Public (32), City and County of New York.

Approved.

R. W. PECKHAM,

*Associate Justice of the Supreme Court
of the United States.*

(Endorsed :) U. S. circuit court of appeals, second circuit. George M. Israel, plaintiff in error, against Charles F. Gale, as receiver of the Elmira national bank, defendant in error. Bond. Frank Sullivan Smith, attorney for plaintiff in error, 54 Wall St., New York, N. Y. Approved. E. H. Lacombe, U. S. circuit judge. N. Y., Feb. 6, 1898. United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

72 UNITED STATES OF AMERICA, ss.:

To Charles F. Gale, as receiver of the Elmira national bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein George M. Israel is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this first day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,

Associate Justice of the Supreme Court of the United States.

72½ [Endorsed:] Due service of a copy of the within citation in error is hereby admitted this — day of March, 1898.
— — —, attorneys for def't in error.

[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 12, 1898. William Parkin, clerk.

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Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver, &c., Defendant in Error. }

STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo,

Marshal M. Morgan, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of the city of Buffalo, New York; that on the tenth day of March, 1898, he served the annexed citation in error on the attorneys for the defendant in error by delivering to and personally leaving with the Hon. Wilson S. Bissell a true copy of the said citation in error.

Deponent further says that he of his own knowledge personally knew the said Wilson S. Bissell to be one of the attorneys for the defendant in error mentioned in the said citation in error.

M. M. MORGAN.

Sworn to and subscribed before me this tenth day of March, 1898.

WM. R. DANIELS,

Commissioner of Deeds in and for Buffalo, N. Y.

74

UNITED STATES OF AMERICA, } ss:
Southern District of New York,

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 73, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George M. Israel, plaintiff in error, against Charles Davis, as receiver of the Elmira national bank, etc., defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

75

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between George M.

Israel, plaintiff in error, and Charles F. Gale, as receiver of the Elmira national bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
*Associate Justice of the Supreme
Court of the United States.*

76 [Endorsed:] Due service of a copy of the enclosed writ of error is hereby admitted this—day of March, 1898. ———, attorneys for def't in error.

[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 12, 1896. William Parkin, clerk.

77 Supreme Court of the United States.

GEORGE M. ISRAEL, Plaintiff in Error,

vs.

CHARLES F. GALE, as Receiver, &c., Defendant in Error. }

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss:

Marshal M. Morgan, being duly sworn, deposes and says that he is over the age of twenty-one years and a resident of the city of Buffalo, New York; that on the tenth day of March, 1898, he served the annexed writ of error on the attorneys for the defendant in error by delivering to and personally leaving with the Hon. Wilson S. Bissell a true copy of the said writ of error.

Deponent further says that he, of his own knowledge, personally

knew the said Wilson S. Bissell to be one of the attorneys for the defendant in error mentioned in the said writ of error.

M. M. MORGAN.

Sworn to and subscribed before me this tenth day of March, 1898.

WM. R. DANIELS,

Commissioner of Deeds in and for Buffalo, N. Y.

Endorsed on cover: Case No. 16,828. U. S. C. C. of appeals, 2nd circuit. Term No., 265. George M. Israel, plaintiff in error, vs. Charles F. Gale, as receiver of the Elmira national bank. Filed March 21, 1898.